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NOTE

KEEPING A FOOT IN EACH CAMP: ADEQUATE PUBLIC FACILITIES ORDINANCES AS BOTH A CONCURRENCY TOOL AND MEANS OF GENERATING REVENUE

Andrew Balashov

I. Introduction

In late 2012 a bitter war was waged in a small Maryland town. Newspapers portrayed it as a David and Goliath type story; rural residents fighting big business developers to keep them from destroying their small town's charm and character.¹ Yet underlying the conflict were commonplace issues of land use and planning, governed by a little known, yet surprisingly ubiquitous law, known as an Adequate Public Facilities Ordinance.² To set the scene Frederick County, Maryland is like many other counties across the United States that are coping with the effects of growth and demographic change. In decades past its residents have been insulated from the perils associated with unmitigated development experienced by neighboring counties.³ Frederick is predominately a rural county, sparsely populated and dotted with large tracts of farm land.⁴ Many of its long term residents place a pre-

* Cara R. Anthony, *Hundreds Show up at Monrovia Town center Hearings*, FREDERICKNEWSPOST.COM, (January 15, 2014) http://www.fredericknews-post.com/news/economy_and_business/hundreds-show-up-at-monrovia-town-center-hearing/article_1d40b828-27d1-57cd-9470-11aa5581ca3b.html.

2. FREDERICK COUNTY, MARYLAND, MUNICIPAL CODE, ORD. 91-28-028.

3. *Frederick County Quick Facts From the U.S. Census Bureau*, UNITED STATES CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/24/24021.html> (last revised: Mar. 27, 2014) Frederick census data summary shows a high proportion of farm businesses, slow population growth, and roughly 353 people per square mile well below the Maryland average of 594 and not even close to that of Montgomery county, Maryland which is just under 2000 per square mile in 2010.

4. Frederick County Government, *Frederick County Comprehensive Plan: Preserving our Agricultural and Rural Heritage*, <http://frederickcountymd.gov/documents/7/128/894/05-PreservingOurAgriculturalAndRuralCommunity>. PDF 1, 11 (April 2010). This section of the county's comprehensive plan recognizes the need to preserve the county's rural agrarian economy, partly by minimizing development to avoid splitting up critical masses of usable farmland. *Id.*

mium on this quite, slow paced way of life and therefore vehemently oppose any change that threatens to undermine it.⁵ The hustle and bustle that characterizes other rapidly growing counties simply does not exist here to the same degree.⁶ Demographically this is due in part to the relatively low population density.⁷ Detached single family units sit on large parcels of land leading to a much lower percentage of homes per square mile and therefore less people.⁸ As a result, the typical problems that accompany the rapid migration of people into an area have not manifested themselves to any meaningful degree.⁹

Planners long ago foresaw that Frederick's proximity to Washington D.C. meant it couldn't remain insulated from the effects of growth for long. Particularly as real estate prices close to the city rose and more people became willing to live further away and commute to work.¹⁰ Anticipating this decades ago, Frederick did what many other counties all across the country do, they passed laws to control growth.¹¹ Maryland enabling legislation vests counties and municipalities with the power to zone and pass laws to regulate the use of property within their borders.¹² Specifically in 1991 they adopted a county wide Ade-

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5. Jim Zepp, *Facts on Those Moving to or From the County, and Their Origins and Destinations*, MONTGOMERY SENTINEL (November 28, 2013), <http://montgomerycivic.org/files/fedcorner20131128.pdf> data. Article that looks at county migration data and shows that Frederick County is the leading destination for those migrating out of Montgomery County.
 6. See Frederick County Comprehensive Plan *Supra* note 4, at 11
 7. See *supra* note 3.
 8. Elizabeth Kopits, Virginia McConnell, Daniel Miles, *Lot Size, Zoning, and Household Preference: Impediments to Smart Growth?*, RESOURCES FOR THE FUTURE (April 2009) <http://www.rff.org/documents/rff-dp-09-15.pdf>. Discussion paper that compares average lot sizes in the two counties and notes that in Frederick County detached single family units typically sit on just under 2 acres, which is significantly greater than its more populated neighbors that average just a quarter of an acre at the most.
 9. See Chris Patterson, *North County Schools Deal with Overcrowding Issues*, EMMITSBURG.NET, (2004) http://www.emmitsburg.net/archive_list/articles/ce/emmitsburg/2004/schools.htm. The caveat here is "meaningful degree" relative to other counties nearby the problems the county has encountered are minimal, yet since many areas have not seen any growth for 30 or so years facilities are often incapable of accommodating any growth without some improvements. This older, 2004 article details some overcrowding effects in schools that are relatively minor and capable of being remedied through the use of portable classrooms and other remedial measures.
 10. See Liz Essley, *D.C. Area Commutes Taking Longer than Ever*, WASHINGTON EXAMINER, (Mar. 6, 2013) <http://washingtonexaminer.com/d.c.-area-commutes-taking-longer-than-ever/article/2523256>. (Identifying Frederick County as the source of many of the cities mega-commuters or those that have a drive of upwards of 90 minutes to get to work).
 11. See generally Community Development Division, Division of Park and Recreation, *Frederick County, Land Preservation, Parks and Recreation Plan*, (2012), http://frederickcountymd.gov/documents/7/278/LPPRP_TextAPPROVED_28June2012-Final_201207121442410669.pdf.
 12. MD CODE ANN., LAND USE, § 10-202 (West 2013). (originally enacted as Article 66B).

quate Public Facilities Ordinance (hereinafter "APFO").¹³ The law makes developers responsible for a proportional share of the burden their projects would place on county roads, schools, and water and sewer systems.¹⁴ The broader goal is to ensure that development and the infrastructure needed to sustain it would occur concurrently, and that growth would proceed at an "orderly pace" and not overwhelm the surrounding area.¹⁵

APFO's and other concurrency laws¹⁶ are common throughout the country.¹⁷ For example, in Maryland 14 out of 24 counties have enacted APFO's and many municipalities within the counties have adopted their own versions.¹⁸ Questions about the validity, interpretation, or application of an APFO usually arise in the context of litigation in one of two ways.¹⁹ The first is a challenge by a developer that the county lacks authority to enforce the statute²⁰ and the second is a challenge by residents that a project has failed to comply with the standard set by the ordinance.²¹ The potential for litigation is greatest in areas where, rather than take place gradually, the project has the

13. FREDERICK COUNTY, MARYLAND, MUNICIPAL CODE, ORD. 91-28-028 (2011).

14. *Id.*

15. See FREDERICK COUNTY, MARYLAND, MUNICIPAL CODE, ORD. 91-28-028. Section 1-20-4 lays out the intent of the statute as "concurrency. . .so orderly development and growth can occur."

16. See Ed Bolen, Karen Brown, David Kiernan & Kate Konschnik, *Smart Growth: State by State*, (2001) 1, 1-5 <http://gov.uchastings.edu/public-law/docs/smartgrowth.pdf>. In different jurisdictions the laws can sometimes be structured to achieve the same result but go by different names, for example MLUL in California or GMO in New Jersey. The actual name for the ordinance is not dispositive rather it is the thrust of the statute and its goal of managing growth by ensuring adequate facilities occur concurrently with development. Often the scope of each ordinance varies based on what a particular locality identifies as its priorities. *Id.*

17. *Id.*

18. The APFO Work Group of the Maryland Sustainable Growth Commission, *Adequate Public Facilities Ordinances in Maryland Annual Report Review* (2012), <http://planning.maryland.gov/PDF/YourPart/773/20130325/AdequatePublicFacilitiesDraftReport032513.pdf>.

19. See generally *infra* notes 20 and 21.

20. See David Boraks, *Developers Challenge Town's Adequate Facilities Ordinance*, DAVIDSONNEWS.NET (December 23, 2009) <http://davidsonnews.net/blog/2009/12/23/developer-challenges-towns-adequate-public-facilities-ordinance/>. Here the developer alleged that the town was simply using the APFO as a means of assessing otherwise illegal impact fees. *Id.*

21. Elizabeth Waibel, *Proposals for APFO waivers in Rockville prove contentious*, GAZETTE.NET, Oct 1, 2013, <http://www.gazette.net/article/20131001/NEWS/131009781/1094/proposal-for-apfo-waivers-in-rockville-proves-contentious&template=Gazette>. The article tracks attempts by the city of Rockville, Maryland to amend its long standing APFO in order to reflect changing trends in current growth and development. While the result would be simply to allow more growth where it is already encouraged and occurring residents none the less categorically oppose any such changes citing concerns about school over-crowding and a wariness that sanctioning such amendments will lead to a slippery slope where future amendments are carelessly made thereby rendering the statute almost ineffective. *Id.*

potential to completely transform the character of a community in a short amount of time.²² Projects like this are exactly the type that the statutes were enacted to regulate but often their effectiveness is compromised when officials apply them improperly, so as to subvert the ideals of concurrency and mitigation that they were founded upon.²³ While in theory a great tool to manage growth, APFO's often fail to achieve the goals associated with the very system that led to their creation.²⁴ Counties have relied on these laws as a means of generating supplemental revenue and sometimes apply that revenue to fund projects that they otherwise would not be able to pay for.²⁵ With so many APFO's drafted to allow for the assessment of impact fees, cash waivers, and mitigation fees, planning and concurrency goals can become overshadowed without adequate oversight. This paper will ask whether APFO's and similar concurrency statutes are being relied on by counties as a means of collecting money from developers that they otherwise could not. It will look at problems arising in the context of "pay to build" agreements and instances of misuse. The conclusion will assert the need for a long term checks and balances system to ensure that any money collected is used for its intended purpose and within a reasonable amount of time.

II. Background

A. APFO's in Action, A Local Profile

Frederick County's APFO was put to the test during a protracted battle between established residents of the Monrovia community²⁶, developers, and the city council.²⁷ The conflict is noteworthy because it illustrates the challenges involved in attempting to implement and comply with an APFO ordinance and demonstrates the competing in-

22. See Daniel R. Mandelker, *Legislation for Planned Unit Developments and Master-Planned Communities*, 40 Urb. Law. 419, 420-22 (2008). Planned unit developments are mixed use areas that incorporate residential, business, districts into small areas. They have become the preferred method of zoning for growth in recent years. *Id.* at 420.

23. See Ed Bolen, Karen Brown, David Kiernan & Kate Konschnik *supra*, note 16 at 6.

24. Elisa L. Paster, *Creating Effective Land Use Regulations Through Concurrency*, 43 NAT. RESOURCES J. 753, 760 (2003).

25. Department of Legislative Services, *Managing Growth: The Use of Development Impact Fees and Building Excise Taxes in Maryland: 2011 Supplement* (2011) available at http://dls.state.md.us/data/polanasubare/polanasubare_intmatnpubadm/polanasubare_intmatnpubadm_annrep/2011-Managing-Growth-supplement.pdf.

26. Monrovia, Maryland is a small unincorporated community located in Southeastern Frederick County.

27. Shayna Halper, *Monrovia Towncenter Hearings Pack Winchester Hall*, YOUR4STATE.COM (last update 10-31-2013 2:13PM), http://www.your4state.com/story/monrovia-town-center-hearing-packs-winchester-hall/d/story/eBiPgN-p1ky_z5CGVLksEQ.

terests that must be accounted for when interpreting the statute to the satisfaction of both sides.²⁸ Finally, because Frederick's APFO is not unlike many others in effect across the country, its application locally is illustrative of similar disagreements that occur nationwide that highlight both the benefits and shortcomings of concurrency statutes.²⁹ In 2004 75-80 Properties, a developer, proposed to develop 450 acres on the edge of the county³⁰ into mixed use residential and retail space.³¹ Almost immediately the project, known locally as the Lansdale expansion, met with vehement opposition from the surrounding community.³²

The Lansdale project could potentially increase the existing population of Monrovia by 30% and increase the aggregate traffic that passed over the areas roads by 300% all within a few short years.³³ Residents who were already living in the area feared the consequences of this that would follow from this sudden migration of people into an area that had seen little to no improvement in its infrastructure for nearly two decades.³⁴ As a result residents formed an organized opposition to the project in order to give voice to their concerns and assert their interests as tax-payers and voters.³⁵ They group branded them-

28. The viewpoints expressed at the meeting ranged from those categorically opposed to any development because it would change the towns rural character, including one person who recalled fondly not being able to install street lights because it bothered the cows, to people who worried about the size of the development and potential planning errors, to those that welcomed the ability to shop close to home. *Id.*

29. *Id.*

30. Community Development Division, *Department of Planning and Urban Review, Executive Summary: Should BOCC Proceed to Public Review Process on Developers Rights and Responsibilities Agreement for Lansdale Subdivision*, available at http://frederickcountymd.gov/documents/136/6603/DRRA%20and%20%20Phase%201%20Amendment_201208011018213468.pdf

31. See *Monrovia Town Center Planned Unit Development*, available at http://frederickcountymd.gov/documents/7/8050/MONROVIA%20Profile%20FINAL_4Mar2013_201303111323334690.pdf. The project was originally proposed to cover 457 acres, with commercial and residential mixed use as part of the PUD rezoning and include 1,510 residential dwellings. *Id.*

32. Tony Di Domizio, *A Different Lansdale Expansion*, MONTGOMERYVILLE-LANSDALE PATCH (Jan. 19 2011, 5:41 AM) <http://lansdale.patch.com/groups/politics-and-elections/p/a-different-lansdale-expansion>

33. See Shayna Halper, *supra* note 27. The Maryland census currently estimates the total population of the surrounding areas (Urbana, Monrovia and New Market) at roughly 6000 people at the end of construction and once all the available units are occupied over 2000 new residents could be added to the area. *Id.*

34. See Pam Abramson, *Plan to add 2,600 Homes in Monrovia Ignites Information Campaign*, FREDERICK NEWS POST, fredericknewspost.com, (March 12, 2013) <http://www.wtop.com/41/3247957/Plan-to-add-2600-homes-in-Monrovia-ignites-info-campaign>.

35. See RESIDENTS AGAINST LANSDALE EXPANSION, <http://www.ralemonrovia.com/> The group maintains an active website, this is used as a public forum where residents can view pertinent documents, post news, or get information about where and when the latest hearings are taking place. *Id.*

selves RALE, which stands for Residents Against Landsdale Expansion, they retained legal counsel and undertook a widespread marketing campaign in the community, fought with yellow cardboard yard signs that denounced the project and pleaded for solidarity amongst the opposition.³⁶ Numerous public hearings were held on the matter, both in front of the county council and in private forums such as churches, schools, and fire halls where residents could express frustration and ire at county officials and concerns about the project.³⁷ The RALE supporters were not categorically against development because it would change the aesthetic of their community, their concerns were predicated on issues of safety, long term costs associated with the project, and the ability of schools to accommodate the new students.³⁸ All issues the 1991 Frederick APFO and its local incarnation were enacted to address³⁹

Residents voiced their worries in front of the town's planning board that more cars and more pedestrians on roads that, structurally and logistically, are not suited to handling them would mean more accidents.⁴⁰ Many of the existing roads were narrow, lacked sidewalks, or crosswalks and had been awaiting funding for repairs or improvements prior to the announcement of the project⁴¹ RALE argued that schools could not handle the new students without serious expansion and an influx of cash.⁴² While not overcrowded many schools were at or near capacity and with the project estimated to add another 850

36. See Patti S. Borden, *Monrovia Town Center Protesters Gather Downtown*, FRIENDSOFFREDERICKCOUNTY.ORG (January 1, 2013) <http://friendsoffrederickcounty.org/fnp-monrovia-town-center-protesters-gather-downtown/>.

37. See *id.*

38. See *Who We Are*, Residents Against Lansdale Expansion, <http://www.ralemonrovia.com/who-we-are.html> (last visited May 20, 2014)

39. While a countywide APFO can set baseline standards that lay the foundational framework for a concurrency model generally the entire system is strongly dependent on the cooperation of incorporated municipalities, who otherwise have independent zoning authority, to pass similar ordinances that mirror those the county. Otherwise the result is uneven or inconsistent growth. See Elisa L. Paster *supra*, note 24 at 768.

40. See Bethany Rodgers, *RALE: Town Center Study Underestimates Increased Traffic*, FREDERICK NEWS POST, (November 28, 2013) http://www.fredericknewspost.com/news/economy_and_business/business_topics/building/article_7645f14b-9031-5a96-b865-683a9bf838c8.html. The opponents of the project hired their own company to conduct a traffic impact study. They claimed the county's traffic impact study failed to take into account all of the intersections that would be impacted, as well as the increase from nearby projects. *Id.*

41. See *id.*

42. See Kevin Mcmanus, *Citizens Group Raises Concerns About Residential Development*, WFMD.COM (September 29, 2013) <http://www.wfmd.com/articles/wfmd-local-news-119935/citizens-group-raises-concerns-about-residential-11693815/>. Suggests that the measures taken to date to alleviate school overcrowding are not enough considering the amount of new students that will be added through construction. Area schools are already crowded and using portable classrooms as temporary solutions. *Id.*

students to the local school system the question was not if new schools would need to be built but how soon and who would pay.⁴³ New schools also means more buses, bus drivers, teachers, and support staff traditionally funded by the county through property tax levies. Residents worried that developer concessions now would be woefully inadequate years later when the full effects of the population change would be felt.⁴⁴ Other ancillary issues, though no less important, raised by the opposition were emergency services such as fire and police, water and sewer and the potential that existing systems would have to be greatly expanded to accommodate the new development.⁴⁵ The underlying concern common to all of these issues was costs.⁴⁶ How should the burden be apportioned between the new residents who would move into the project, the developers, the county, and those already living in Monrovia?⁴⁷

The Frederick County APFO conditions the formal approval of most projects on minimum standards of adequacy outlined in the statute being met.⁴⁸ So the first test, prior to any negotiations, is to determine that in fact the scope of the project will exceed the existing public facilities.⁴⁹ In the instant case, the developer, 75-80 Properties, invested substantial amounts of money to conduct impact testing of roads, sewers and schools.⁵⁰ Given the size of the project it is not surprising that it failed to meet minimum threshold adequacy standards in all of the potential categories covered by the statute.⁵¹ Because the

43. *See id.*

44. *Id.*

45. *See* Rodgers *supra* note 40.

46. *Id.*

47. *See* Bethany Rodgers, *Monrovia Residents say Impact Fee Elimination Would be Developer Boon*, (November 17, 2013) http://www.impactfees.com/pdfs_all/busi.pdf.

48. FREDERICK COUNTY, MARYLAND, MUNICIPAL CODE, ORD. 91-28-028. The APFO exempts three types of projects from its requirements, those undertaken by the municipality, those that do not add any residential units and those that add no more than five residential units. *Id.*

49. *Id.*

50. *See* 75-80 Properties, LLC v. Frederick County, Maryland, No. RDB 09-2977, 2010 WL 917635, at * 3-5 (D. Md. 2010). The developers later brought a lawsuit against the county after they had expended considerable sums of money on adequacy testing relying on the county's grant of preliminary approval. The total sums spent are in excess of 1.7 million dollars and cover the gamut of services, including payments to design and planning consultants, traffic experts to conduct capacity studies, county fees associated with the above and attorney's fees. *Id.* at 3.

51. Frederick County Planning Commission October 23, 2013 Public Hearing, http://frederickcountymd.gov/documents/136/8042/MonroviaTownCenterDRRA12-06_FcPc%2010.23.2013%20Staff%20Report_201310171305185426.pdf (October 13, 2013). http://frederickcountymd.gov/documents/136/8042/MonroviaTownCenterDRRA12-06_FcPc%2010.23.2013%20Staff%20Report_201310171305185426.pdf (October 13, 2013). The APFO that governs the project covers road, water, sewage, and schools. In the above cited agreement the developer agreed to make mitigation pay-

APFO is not meant to enable towns to enact a moratorium on building it instead provides for a system of mitigation fees and land donations that the developers can pay in order to be granted preliminary approval of their project.⁵² Any fees collected or land received would be put toward the construction of the necessary facilities in due time.⁵³

Subsequently the developers entered into negotiations with the city council to determine what type of concessions were sufficient to allow the project to go forward.⁵⁴ The ultimate agreement was embodied in the Letter of Understanding, a document prepared by the city council that lays out the developer's rights and responsibilities with respect to the APFO.⁵⁵ The terms were hotly contested by residents and the developers alike.⁵⁶ For example, the disparity between what the residents of Monrovia claimed would be necessary to mitigate the impact of the project on local roads and what 75-80 Properties ultimately agreed to pay was roughly 230 million dollars.⁵⁷ Arguably the figure claimed by the residents is unfair because it includes improvements that would have been necessary in the short term regardless of the impact of the Lansdale project.⁵⁸ Even at the prior, moderate, intrinsic pace of growth sections of area roads were identified as being inadequate and in need of expansion and repair.⁵⁹ The claim by the residents is representative of a wide spread trend to attempt to shift as much of the burden of growth onto those who are seemingly responsible for it, the

ments or in-kind donations in each of the categories with the most substantial being for school improvement and roads a close second. *Id.*

52. FREDERICK COUNTY, MD, MUNICIPAL CODE, ORD. 91-28-028. Defines a moratorium as any act by the legislature that halts the development because of inadequate facilities. The statute has remedial measures built in should this occur that allow the developer to recoup lost time and costs incurred as a result of the moratorium. Concurrency policy widely recognizes that APFO's are not meant to stop development categorically. *Id.*
53. *See id.*
54. Frederick County Board of County Commissioners, Letter of Understanding for Monrovia Town Center Planned Unit Development, available at http://frederickcountymd.gov/documents/7/8050/LOU%20MTC_DRAFT_17Oct2013_201310221348034262.pdf.
55. Bethany Rodgers, *Residents Challenge Commissioners During Monrovia Town Hall Meeting*, the Frederick News Post (April 10, 2014), http://www.fredericknewspost.com/news/economy_and_business/business_topics/building/residents_challenge-commissioners-during-monrovia-town-center-hearing/article_69b05dc6-991e-5944-aa45-b1077eb3eda3.html.
56. *See* Courtney Mabeus, *Monrovia Town Center Hearings Begin Tonight*, FREDERICK NEWS POST (January 14, 2014) http://www.fredericknewspost.com/news/economy_and_business/monrovia-town-center-hearings-begin-tonight/article_03728f76-a745-50f5-ab0c-d00ebbd54930.html.
57. The residents relied on county and state figures that were an estimate of what it would cost to upgrade the two major roads in the area where the project was to be built. *Id.*
58. *See id.*
59. *See id.*

developers.⁶⁰ The opposition to the project also complained of other terms in the agreement that they saw as being unfairly preferential to the developers.⁶¹ First the approval for the project granted for 25 years, a term that is unusually long considering the greatest period for residential subdivision approval provided for in the ordinance is only 15 years.⁶² Residents also disputed the accuracy of the studies conducted by the developers, they hired their own traffic expert who concluded that the original survey had underestimated the potential effects of the construction.⁶³ There was also strong evidence put forth that the amount of mitigation fees that the developers would ultimately wind up paying would “barely cover the cost of one new school”⁶⁴ a drop in the bucket when the projected estimate of new students to all schools in the area is 850.⁶⁵

In light of the carefully crafted and seemingly well thought-out language of the APFO ordinance the question of adequacy is still questionable.⁶⁶ At a point where the project is slated for approval the doubts about the ability of the area to handle the influx of people are the same if not worse than at the outset.⁶⁷ This result seems to be incongruous with the concurrency model that the statutes are based upon. One drawback is the reliance on cash contributions rather than tangible benchmarks concerning adequacy.⁶⁸ This limitation can be best understood by looking at the history of the concurrency system,

60. See generally Steven McKay, *Monrovia Town Center Will Make Green Valley Road More Dangerous*, FREDERICK NEWS POST (October 13, 2013) http://www.fredericknewspost.com/news/economy_and_business/business_topics/real_estate/article_b085b86a-db72-559e-b55d-fa53ea448dad.html. The authors point is well taken, the roads in the area are dangerous but they have been dangerous, his own admission, for years. The ultimate solution is not to avoid development, something fundamentally inconsistent with land use theory but to fix the roads, and arguably the infusion of resources from the town center project will be the first steps to a comprehensive overhaul of the road system in the area. *Id.*

61. See *id.*

62. FREDERICK COUNTY, MARYLAND, MUNICIPAL CODE, ORD. 91-28-028.

63. See Rodgers *supra* note 40.

64. Rodgers, *supra* note 47.

65. *Id.*

66. See Courtney Mabeus, *Monrovia Town Center: Round 2*, FREDERICK NEWS POST (January 16, 2014) http://www.fredericknewspost.com/news/economy_and_business/business_topics/agriculture/monrovia-town-center-round/article_342df276-218d-55f8-9be4-934d8b654112.html. Article cites frustration of residents who are unable to get a clear answer from the board on specifics regarding mitigation measures for roads. No exact dates on when such remedial measures will begin, or where or if funding will be secured. *Id.*

67. See *Id.*

68. Bethany Rodgers, *Monrovia project opponents scrutinize Young's campaign donations*, FREDERICK NEWS POST (Oct. 9, 2013), http://www.fredericknewspost.com/news/economy_and_business/business_topics/building/monrovia-project-opponents-scrutinize-youngs-campaign-donations/article_7b8ee3d6-5fba-55a7-8609-825fd8e8b38d.html?mode=story

the evolution of municipal laws designed to enforce its goals, and where they have failed in the past.

B. The Concurrency Model: a Primer.

The idea of concurrency in the context of community growth essentially means what the name suggests, that growth, rather than outpace the ability of surrounding infrastructure to handle it, should happen simultaneously with the required upgrades to roads and schools.⁶⁹ It's a proactive rather than reactive model that, through careful demographic and population studies, sets minimum benchmarks, known as level of service standards, that must be met before certain stages of the development can go forward.⁷⁰ The idea that a municipality could prevent or stop development because certain adequacy standards had not been met was tested in several key court decisions.⁷¹ In *Golden v.*

69. Jamie Baker Roskie; Janna Blasingame Custer, *Adequate Public Facilities Ordinances: A Comparison of their use in Georgia and North Carolina*, 15 SOUTHEASTERN ENVTL. L.J. 345, 350 (Spring 2007).

70. *Managing Maryland's Growth: Adequate Public Facilities Ordinances (APFOs)*, MARYLAND DEPARTMENT OF PLANNING, 3, <http://www.mdp.state.md.us/PDF/OurProducts/Publications/ModelsGuidelines/mg24.pdf> (last visited May 20, 2014). One criticism of APFO's is that sometimes they can inhibit growth or development by allowing opposition to such development to require mandatory adherence to the service standards in the statute even when concededly it makes little common or practical sense to do so. See *Anselmo v. Mayor*, 7 A.3d 710, 712-13 (Md. Ct. Spec. App. 2010). Where residents brought an action against the city of Rockville claiming the city did not comply with its own APFO in misapplying level of service standards when looking at the impact on school capacity of a newly proposed affordable low level income housing project. *Id.* The court sided with the residents and in dicta expressed mild frustration with the results stating that that "it makes little or no common sense to follow the plain language of the APFO and perform the required analysis, much less to remove student places from the pool of potential development near a school early in the process when a use permit is issued, we did not write the City's ordinance." *Id.*

71. See *infra* *Anselmo v. Mayor*, 7 A.3d 710, (Md. Ct. Spec. App. 2010) (where residents brought an action against the city of Rockville claiming the city did not comply with its own APFO in misapplying level of service standards when looking at the impact on school capacity of a newly proposed affordable low level income housing project); *Golden v. Planning Bd. Town Of Ramapo*, 285 N.E.2d 291 (Ct. App. N.Y. 1972) (a town's zoning ordinance that required a special permit or variance before subdivision approval was constitutional because the purpose of the zoning ordinance, phased growth, was a legitimate zoning purpose); *Naylor v. Twp. of Hellam*, 773 A.2d 770 (2001) (the supreme court reversed the order that had upheld a township temporary moratorium on certain types of subdivision and land development while the township revised its zoning and subdivision land development ordinances and directed the township to review the owners' applications according to the zoning and subdivision ordinances in effect at the time they were filed); *Longridge Builders, Inc. v. Planning Bd. of Princeton Tp.*, 245 A.2d 336 (1968) (township planning board could not require subdivision developer to pave a right-of-way because the relevant subdivision land ordinance did not establish any standards or procedures for apportioning the cost of off-site improvements).

Planning Board Twn. Of Ramapo, Ramapo's zoning board voted to forestall a planned development until some of the town's public facilities reached a predetermined level as measured by a point system then in place.⁷² The zoning board's resolution further specified that the developer could, at his own expense, provide the requisite upgrades in order to allow the development to move forward.⁷³ The developer landowner brought suit, alleging a constitutional violation in the form of interference with his property rights by the board. As landowners they claimed an absolute right to develop the land as they saw fit, irrespective of the town's requirements.⁷⁴ The Court upheld the actions of the town as within the ambit of their zoning power but qualified their opinion by saying such power was not absolute, any such restrictions on growth cannot be permanent and should bear a rational basis to legitimate needs of the community.⁷⁵

The decision embodied certain concepts that would become fundamental in establishing the concurrency model of growth. First the court reiterated that the ability of any town or county to enact and enforce such laws is strictly tied to the enabling legislation of a state that grants it such authority.⁷⁶ It's a direct connection that later courts expounded to mean that what the enabling legislation omits or is silent on the APFO cannot grant the authority to do.⁷⁷ Second, is the importance of timing or phased growth, the expectation in Ramapo was that the improvements necessary to attain adequacy would occur in the near future, a year in an example used by the court.⁷⁸ Finally, the *Ramapo* court recognized that such statutes must not be used to unfairly shift the burden on an unpopular party, usually the developer, in order to avoid costs "that time and growth inevitably bring."⁷⁹ These are issues that would come to inform the process by which courts analyzed APFO statutes and challenges to their application.⁸⁰

72. *Golden v. Planning Board Twn. Of Ramapo*, 285 N.E.2d at 291. The point system mirrored modern APFO statutes in that it took into account what the city defined as essential facilities (1) public sanitary sewers or approved substitutes; (2) drainage facilities; (3) improved public ***144 parks or recreation facilities, including public schools; (4) State, county or town roads—major, secondary or collector; and, (5) firehouses. *Id.* at 295.

73. *Id.* at 382.

74. *Id.* at 365-66.

75. *Id.* at 382-83.

76. *Id.* at 371.

77. *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142 (county lacked the authority under N.C. Gen. Stat. §§ 153A-4, 153A-340, and 153A-341 to adopt an adequate public facilities ordinance (APFO) that effectively conditioned the approval of new residential construction projects on developers paying a fee to subsidize new school construction, because the APFO was not a zoning ordinance).

78. *Ramapo*, 30 N.Y.2d at 375.

79. *Id.* at 377.

80. Elisa L. Paster, *Creating Effective Land Use Regulations Through Concurrency*, 43 NAT. RESOURCES J. 753 (2003)

APFO's are land use regulations that are intended to deal primarily with the timing of growth not where or whether it should occur.⁸¹ When they first came about, these statutes were regarded as highly effective because they relied on actual quantifiable measures as standards for determining adequacy.⁸² Before a public facilities ordinance is approved in a municipality local data is collected and compared with national standards and a set of workable criteria are then used to determine the scope of the ordinance.⁸³ For example, when a developer is assessing whether their project will overburden the existing school system they will use the capacity rating in the statute, usually expressed as a percentage of the state rated capacity, and then calculate the increase in students that will result from the project.⁸⁴ A downfall is that often the calculations can become rather complex and provide inconsistent results.⁸⁵ APFO's also provide a checks and balances system that fosters transparency in dealings between developers and public officials by ensuring consistent standards and criteria that govern approval of projects.⁸⁶

The structure of a typical APFO is fairly flexible, allowing it to be narrowly tailored to the specific needs of a given community.⁸⁷ It should be noted that this final attribute, while in most cases a benefit, is also representative of one of the drawbacks of making decisions on such a local level.⁸⁸ The danger is that even within a small region standards and rates of growth can vary widely depending on the prefer-

81. See *Naylor v. Township of Hellam*, 773 A.2d 770, 775 (2001). The court here, confronted with growth management laws that effectively precluded any building for an indefinite period, struck down the law suggesting that the power to regulate and manage does not entail the power to stop growth entirely. *Id.*

82. See Paster *supra* note 80 at 761.

83. *FREDERICK COUNTY, MARYLAND, MUNICIPAL CODE, ORD. 91-28-028*. The Frederick APFO requires less than 100% of state rated school capacity to meet level of service standards. Meaning the future enrollment cannot exceed 100% of what the state of Maryland has deemed to be threshold capacity. This is a strict standard as other APFO's allow deviations as high as 120% above state minimum levels.

84. *Id.* Section 1-20-61 of the Frederick County APFO lays out the school impact testing guidelines.

85. See *Anselmo v. Mayor*, 7 A.3d 710, 712-13 (Md. Ct. Spec. App. 2010). Residents challenged the cities interpretation of its own APFO school capacity formula and won. *Id.*

86. See *Longridge Builders, Inc. v. Planning Bd. of Princeton Tp.*, 245 A. 2d 336 (1968). The danger that existed prior to such ordinances was summed up by the court who said, "without an appropriate ordinance setting forth standards and procedures, the planning body would be left with an impermissibly broad range of discretion in exacting off-site improvements from subdividers; landowners and developers would have no basis for planning; and reviewing courts would be without a measuring rod to gauge the validity of the imposition." *Id.* at 351.

87. See *id.*

88. See *id.*

ence of a given community and in some cases APFO's can become a means of exclusion rather than phased growth.⁸⁹

C. *The Scope of a Typical APFO.*

The authority of a county or township to pass and enforce an APFO or similar law is derived from its zoning power.⁹⁰ A state must first pass enabling legislation that vests counties and cities with this power.⁹¹ A community that subsequently identifies the need for a managed growth plan must decide what facilities and services the ordinance will apply to, what type of developments it will regulate, and what procedural processes to put in place for developers to assess potential conflicts and work out solutions with the appropriate regulatory body.⁹² The statute must also lay out options for when adequacy standards are not met or the developers plan is inconsistent with the APFO.⁹³ Commonly, what is allowed is for a developer to pay a sum of money in order to be granted approval to begin construction.⁹⁴ The county or city then earmarks this payment for the building of the necessary facilities to ensure compliance with the minimum standards in the ordinance.⁹⁵ This is often referred to as a "pay now build later" and the argument in its favor is that to allow otherwise and force developers to wait until the necessary facilities are constructed as the leisure of the

89. *See C & M Developers Inc., v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143, 145 (2002). Holding that minimum acre requirements for lot sizes bore no reasonable relationship to towns growth management goals and was effectively a means of exclusion. *Id.*

90. MD. CODE ANN., ART. 2B, § 6-102 (West 2013).

91. Often this is known as a "home rule ordinance" and in Maryland is codified in Article 66B of the code.

92. Gerrit-Jan Knapp, John W. Frece, *Smarth Growth in Maryland: Looking Forward and Looking Back*, 43 IDAHO L. REV. 445, 463-64 (2007).

93. *See Union Land Owners Ass'n., v. County of Union*, 689 S.E.2d 504, (2009). For example the APFO then in force provided developer with the following options, 1) deferring approval for five years; (2) postponing development until school capacity becomes available; (3) scheduling the development to match the rate of school capacity growth; (4) redesigning the proposed development to reduce the impact on school capacity; (5) requesting minor plat approval so as to exempt the proposed development from APFO conditions; (6) offsetting any excess impact on school capacity resulting from the proposed development by providing a VMP to the County; (7) constructing school facilities to offset the proposed development's impact in excess of estimated school capacity; or (8) satisfying, with defendant's approval, other reasonable conditions offsetting the proposal's impact on the capacity of schools serving the proposed development. *Id.*

94. *See id.*

95. Level of service standards look at the capacity and demand for a given public facility both of these are reduced to measurable units that allow for easy comparison and an easy to use benchmark. The benefit is at least in theory an objective and transparent system that both developers and planning officials can rely on, rather than subjective assessments of perceived community problems that can often be subject to political influence or the like. *See Paster supra* note 24, at 763.

county may force them to miss the market and cause their venture to become unprofitable should demand recede.⁹⁶

Closely tied with the assessment of a mitigation fee, the ordinance must address the procedure that will be followed when, subsequent to the submission of a development plat and the accompanying specifications, the facilities are found to be inadequate to support the proposed development. One option is a waiver, whereby the governing body agrees to waive certain conditions when it determines that is in the best interest of the city or county.⁹⁷ The developer could also make an in-kind contribution and donate land that will be used as the site of a new school or recreational area.⁹⁸ In other cases they will agree to make the necessary improvements concurrent with the development, this is often the case with roads and sewer lines since it makes little sense to complete these projects after construction has completed.⁹⁹ Once an agreement is reached between the governing body and the developer a letter of understanding regarding the APFO approval conditions is issued.¹⁰⁰ This document sets out what the developer has agreed to do pursuant to the granting of approval, often in very specific terms.¹⁰¹ For example, the Letter of Understanding that was granted to 75-80 Properties regarding the Lansdale project required them to bring road capacity up to a specified number of trips

96. See *Nunziato v. Planning Bd of Borough of Edgewater*, 541 A.2d 1105 (1988). Where court struck down the validity of agreements between a developer and a planning board because the negotiations amounted to a "bidding war" and amounts involved were wholly arbitrary in light any substantive goals of growth management. See also *Township of Marlboro v. Planning Bd. of Tp. of Holmdel* 653 A.2d 1183, 1186 (1995). describing the danger to be avoided as "whether the illegal exaction constitutes a blatant *quid pro quo* for the approval, either demanded by the municipality and acceded to by the developer or offered by the developer and accepted by the municipality in circumstances in which the exaction is unrelated to any legitimate land use concerns generated by the development application itself and the amount thereof is entirely arbitrary. If that is so, then the transaction may be fairly regarded as an interdicted sale of a municipal approval, subversive of law, anathematic to public policy, and remedial only by vitiation of the approval". *Id.*

97. See Elizabeth Waibel, *Proposal for APFO Waiver in Rockville Proves Contentious*, GAZETTE.NET (October 01, 2013) <http://www.gazette.net/article/20131001/NEWS/131009781/0/gazette&template=gazette>.

98. Steven H. Ott, Dustin C. Read, *The Effect of Growth Management Strategies: Adequate Public Facilities Ordinances and Impact Fees A Review of Existing Strategy*, Available at, <https://www.naiop.org/~media/9887459CA2A243F19B542D68CEA45B4D.ashx>

99. See Paster *supra* note 24 at 767.

100. A letter of understanding of a memorandum of understanding is a legal form in commercial law that sets out the intent of the parties regarding the project and basic parameters. Often it is the foundation for grant of preliminary approval which is then later memorialized in the developer rights and responsibilities agreement.

101. See Paster *supra* note 24.

per morning rush hour and evening rush hour.¹⁰² At this point, the developer has a reliance interest based on the grant of approval and can bring an action based on determine reliance to recover for any costs spent in good faith subsequent to the grant of approval if the approval is unjustifiably terminated at a later date.¹⁰³ The building and approval process takes time, so concurrency is ultimately a relative word and construction will usually proceed in spite of inadequacies, with the plan that the necessary school or road projects will be completed down the road.¹⁰⁴ Often the ordinances lack any substantive regulations on how long this time period might be and if there is a way by which the status of any such deferred project is monitored to ensure it adheres to a scheduled.¹⁰⁵

III. Issue

It is not atypical for APFO's and other growth mitigating statutes to be linked as a funding measure with other state or county projects.¹⁰⁶ In Maryland alone one study suggests that more than half the APFO's currently in place in the various counties are what are called "resource-expansive" meaning that potential revenues assessed against developers are factored into determining available funding for short range infrastructure projects identified in an areas capital improvements plan.¹⁰⁷ The issue becomes to what extent, if at all can a governing body rely on the passage of the APFO, or similar statute, as the basis for legal authority to exact money from developers? The answer, as to the scope of this power, is not immediately clear. Can a municipality use such funds for projects not connected to the development in question, projects that will see no significant increase in use or a reduced capacity as a consequence of the building.

States have disagreed to some degree as to how willing they are to interpret and APFO as granting separate and distinct powers not independently granting by the states enabling legislation.¹⁰⁸ Public offi-

102. FREDERICK COUNTY, MARYLAND, MUNICIPAL CODE, ORD. 91-28-028.

103. County Comm'rs for Carroll County v. Forty West Builders, 941 A.2d 1181 (Md. Ct. Spec. App. 2008). Upholding developers estoppel claim after county pulled preliminary approval and the developer had expended significant money fulfilling conditions of the approval. Here the county tried to amend its APFO level of service standards, making them more stringent and thereby nullifying the original approval.

104. *Id.*

105. *Id.*

106. *Id.*

107. University of Maryland, Center for Smartgrowth Research and Education, *Adequate Public Facilities Ordinances in Maryland: Inappropriate Use, Inconsistent Standards, and Unintended Consequences*, April 20, 2006.

108. See Jamie Baker Roskie, Janna Blasingame Custer, *Adequate Public Facilities Ordinances: A Comparison of their Uses in Georgia and North Carolina*, 15 SOUTHEASTERN ENVTL. L.J. 345, 350 (2007). Noting that the attitude of the courts towards APFO's in North Carolina was particularly hostile in the absence of

cials often attempt, with some regularity, to skirt the limitation of enabling legislation and try to collect impact fees through the APFO.¹⁰⁹ For the developer, time is of the essence, the longer the delay in construction the greater risk that the market demand could dissipate or a competitor could gain an edge. Therefore it often makes more sense simply to pay the fee and proceed with the project, especially considering the potential windfall profits at stake will often more than make up for it on the back end.¹¹⁰ When challenges do occur, they are either constitutional, or a developer can bring what is known as an Ultra Vires action, meaning that the county, township, etc. has acted in such a way as to transgress the bounds of authority allowed it by the state.¹¹¹ What follows, in the discussion below, is an analysis of the attempts by public officials, sometimes in good faith, and sometimes in bad, to adapt APFO's as a means of revenue collection and challenges by developers that such action is outside the scope of authority granted by the state. It will look at the courts analysis in the respective cases, how courts vary in their interpretation state by state, various factors that affect the outcomes of the decisions, and the adverse effects that such challenges are having on the overall concurrency model. The conclusion is that such abuses are significantly curtailing the effectiveness of these statutes as a future planning tool.

IV. Analysis

A. *The Potential for Abuse.*

The problem with an ordinance that allows approval to be conditioned on the payment of a sum of money is that it creates tremendous potential for abuse.¹¹² In the absence of adequate oversight and checks and balances system developers could engage in what one court termed a "free-wheeling bidding war."¹¹³ Furthermore, once these sums of money are collected, in the absence of specific language in the statute, there is little accountability as to what happens with the funds afterwards.¹¹⁴ The danger is that the money will simply be added to the counties operating budget and the cost of future improve-

the proper enabling legislation almost all of the pre-existing statutes have been struck down as ultra vires. *Id.*

109. See *Union Land Owners Association v. County of Union*, 689 S.E.2d 504, 508 (Ct. App. N.C. 2009) (holding "[D]efendant may not use the APFO to obtain indirectly the payment of what amounts to an impact fee given that defendant lacks the authority to impose school impact fees directly.").

110. See *id.* at 505.

111. See *id.* at 507.

112. See, e.g. *id.*

113. *Nunziato v. Planning Bd of Borough of Edgewater*, 541 A.2d 1105, 1110 (1988).

114. See *FREDERICK COUNTY, MARYLAND, MUNICIPAL CODE, ORD. 91-28-028*. The Frederick APFO, like others, requires that the money collected for mitigation purposes is kept in an escrow account by the county. In this way it is earmarked for the necessary improvements and kept from being comingled

ments is passed onto the new homeowners who eventually settle in the development.¹¹⁵ Without the knowledge that these payments are made within the context of standards set by a counties APFO it easy to imagine how someone could characterize these payments as an outright bribe. While such abuses are by no means the norm the potential is there for them to occur. *Lanvale Properties, LLC. v. County of Cabarrus*,¹¹⁶ is an extreme example of the potential abuses that can occur under the guise of a counties' seemingly lawful implementation of an APFO statute.¹¹⁷ Lanvale Properties, the developers in this case, brought action against the county seeking to invalidate its APFO as Ultra Vires.¹¹⁸ Their complaint claimed that the county lacked any authority to condition building approval on the developers paying a fee to subsidize school construction.¹¹⁹ While the outcome of the case ultimately turned on the counties lack of enabling authority to enforce the statute,¹²⁰ the court took the opportunity to scrutinize the actions of the county with respect to the developers, labeling their conduct as "anything but reasonable."¹²¹ The county attempted to exact fees from the developer under the authority of the APFO statute. The court concluded that the official's pattern of conduct evinced a clear intent, not to temper growth, but to extend the reach of the statute to collect as much money, from as many projects as they could.¹²² For example, in just over five years county officials voted to increase the maximum per unit amount payable from \$500 to \$8,617 per single family unit, an increase the court noted of almost 1600%.¹²³ They also voted to extend the applicability of the statute to all municipalities that existing within the county because they believed they were missing out on potential revenue from nearby projects.¹²⁴ The cumulative result of the counties vigorous application of the statute was a total budget increase of 267 million dollars in the area of school construction.¹²⁵

The court also found several issue with how the statute was applied. While the ordinance itself provided alternative ways that developers could seek approval when it was clear that capacity would be inade-

with other general funds. All additional payments made on behalf of the developer are then deposited into this account.

115. See, e.g. Roskie, Blasingame *supra* note 69.

116. *Lanvale Properties, LLC. v. County of Cabarrus*, 731 S.E.2d 800 (2012).

117. *Id.*

118. *Id.* at 803-04.

119. *Id.*

120. See *id.* at 828 (holding that the entire APFO statute as written, was outside the scope of authority of the county in absence of enabling legislation which vested it with such powers).

121. *Id.* at 807 n.8.

122. See *id.*

123. *Id.* at 805.

124. *Id.*

125. *Id.*

quate, such as delaying the project pending resolution of an issue within a given school zone, or making changes to their development plan, there were very few instances when these actions resulted in an approval.¹²⁶ Instead the method that was most often pursued and encouraged by the county was paying the requisite fees in order to have your project approved.¹²⁷ The *Lanvale* court shrewdly concluded that the APFO is an "effectively crafted revenue generation mechanism" that establishes a "pay-to-build" system for developers and that as such it is "invalid as a matter of law."¹²⁸

One of the harms that the court recognized and was trying to prevent in the *Lanvale* case was the unfair targeting of an unpopular group, developers, by shifting a disproportionate amount of the costs associated with growth onto them.¹²⁹ This is a responsibility that should fall diffusely on all current and future residents, as well as developers, since all stand to potentially benefit from construction of the new schools and roads, whether in the form of having updated and larger facilities, safer and better designed roads, or shorter travel time.¹³⁰ The court recognized with approval the counties motives of wanting to ensure adequate and well-funded facilities for its residents but simply could not accept the unreasonable and oppressive means employed to achieve their goals.¹³¹

Even when authority exists for the enactment and implementation of an APFO statute that allows some form of reasonable mitigation fees to be paid by developers there is a need for strong legislative oversight.¹³² Ultimately the goal is to avoid the ever present danger that the decision making process will be dominated by the pursuit of the highest possible payout rather than focusing on concrete issues having to do with the adequacy of local facilities and the impact the construction will have.¹³³ This case is the best illustration of why courts are not willing to sanction the use, by a governing body, of an APFO ordinance as a means of revenue gathering in the absence of state legislation that specifically vests such authority with counties and municipalities.¹³⁴ In a state legislature competing interests are tempered as people compromise as part of the legislative process. A state sanctioned grant of power to levy impact taxes and mitigation fees that expressly lays out the permissible bounds of that power greatly

126. *Id.* at 813.

127. *Id.*

128. *Id.* at 814.

129. *Id.*

130. *See id.* at 815.

131. *See id.* at 803, 817.

132. *See* Eric M. Braun, *Smart Growth in North Carolina: Something Old or Something New*, 35 WAKE FOREST L. REV. 707, 717-19 (2000).

133. *Id.*

134. *See Lanvale*, 731 S.E.2d at 814.

reduces the potential for misuse.¹³⁵ Enabling legislation will often have limits on the extent to which a developer can be assessed such fees, requiring that money collected can be used to fund projects that will be directly affected by the developers actions.¹³⁶

This is similar to a rational basis test, which if applied in the *Lanvale* case, would preclude the assessment of the exorbitant fees because the county could clearly not show that they were reasonably proportional to any burdens caused by developer's actions.¹³⁷ A county or small town interpreting an APFO statute may be tempted to make decisions in a vacuum, wherein the developer is seen as unpopular and therefore should shoulder a disproportionate share of the costs of growth.¹³⁸ When such power is granted through the legislature it comes with implicit conditions that the fee assessment cannot be used to such a degree that it discourages development or amounts to a moratorium.¹³⁹ A state legislature is better suited to balancing the competing interests and when it expressly grants the power to lesser bodies to tax it does so with clear conditions and guidelines that work to avoid abuses such as that occurred in the *Lanvale* case.¹⁴⁰

B. Negative Effects on the Concurrency System

The existing case law highlights the problematic tendency of county officials, developers, and courts to treat APFO's merely as a monetary bargaining chip. The developer's only incentive is to pay to avoid delay, but just because the county has a portion of the necessary funds does not mean that facilities will be constructed in time.¹⁴¹ Unanticipated budget problems, leadership changes, and general bureaucratic red tape can hinder subsequent decisions down the road, long after the development is complete and overcrowding in school and on roads a reality.¹⁴²

There is therefore a need for greater accountability as to what happens to the money once it is collected and when secondary mitigation

135. See University of Maryland, Center for Smart Growth Research and Education, *Adequate Public Facilities Ordinances in Maryland: Inappropriate Use, Inconsistent Standards, and Unintended Consequences*, April 20, 2006, available at <http://smartgrowth.umd.edu/APFOMaryland.html>.

136. See *id.* at 26-27.

137. See *Lanvale*, 731 S.E.2d at 814.

138. See *id.* at 826-28.

139. *Id.*

140. *Id.*

141. See M.J. Neuberger, *Queen Annes Board Okays Changes to APFO*, MYEASTERNSHOREMD.COM, (December 15, 2011) http://www.myeasternshoremnd.com/news/queen_annes_county/article_13b22d1c-0133-5695-a572-f2fff053544f.html?mode=jqm.

142. *Id.*

projects that are not within the developers control will commence.¹⁴³ In *Halle Development, Inc. v. Anne Arundel County*¹⁴⁴ the builder brought an action against Anne Arundel County Commissioners challenging the legality of payments it made to the board for the grant of waivers from the APFO school capacity requirements.¹⁴⁵ The challenge here was predicated on a lack of legislative authority that allowed conditioning the grant of the waivers on the payment of a fee.¹⁴⁶ The facts show that the county granted multiple waivers, for a consideration in the form of cash payments and land donations, to developers of residential subdivisions so that they could get around the specific requirements in the APFO governing school adequacy.¹⁴⁷ The court, in its opinion took notice that over the course of 10 years roughly 5 million dollars had been collected by the county, as well as several parcels of land and yet to date no schools had been constructed and the money as far as records indicated was simply comingled with the general funds of the county.¹⁴⁸

In the world of municipal government the mismanagement of impact fees collected pursuant to APFO's is becoming more commonplace.¹⁴⁹ The underlying ideology behind such fees has been that "growth will pay for growth" yet unrecorded fund transfers, and huge budget shortfalls occur even when most APFO statutes require that such money must be held by the relevant governing authority in escrow accounts so as not to co-mingle impact fees with general county funds.¹⁵⁰ The impact fees are not penalty taxes that can be applied to any project that is currently in need of money, their purpose, as stated in the state enabling legislation where they are authorized, is that they are to be used to offset the impact of the development.¹⁵¹ This is reinforced by the case law. For example In *Allied Land Company v. Board of*

143. For example when the developer merely makes an in-kind contribution of land that a county designates as the site of a future school. See *Managing Growth supra* note 25.

144. *Halle Development, Inc. v. Anne Arundel County*, 808 A.2d 1280 (2002).

145. *Id.*

146. *Id.*

147. *Id.* at 1283-85.

148. *Id.* at 1283.

149. See Jacksonville Business Journal, *Tread Carefully with Impact Fees*, BIZJOURNALS.COM (July 24, 2006) <http://www.bizjournals.com/jacksonville/stories/2006/07/24/editorial1.html?page=all>.

150. See Gene Bunnell, *Pros and Cons of Paying for Growth with Impact Fees*, available at <https://www.aae.wisc.edu/pubs/cenews/docs/ce207.pdf> (January 1994). Arguing in support of the pass along model that suggests that developers will rarely be the ones who ultimately fit the bill for the improvements necessary to upgrade the surrounding facilities. *Id.* Because they will most certainly pass along any fees to the new purchasers of homes in the form of a higher price or greater rents. *Id.*

151. FREDERICK COUNTY, MARYLAND, MUNICIPAL CODE, ORD. 91-28-028.

*Sup'rs, Loudon County*¹⁵² the courts were quick to slap the counties hand and chastise them for attempting to illicit funds from a local developer that were to be used to pay for a statewide roads project.¹⁵³ The court noted that the project that the state wanted to pay for using the impact fee money obtained pursuant to a concurrency law similar to an APFO¹⁵⁴ would be little, if at all affected by Allied's development.¹⁵⁵ It would force potential harsh and unjust consequences if they were required to pay for projects outside their zone of impact because the county should not be able to impose fees and exactions that it could not under the law.¹⁵⁶

The consequences for the future success of APFO's as growth management tools are significant. When officials attempt to supplement their tax base by mismanaging APFO's using the funds for non-mitigation projects, the APFO ceases to become a planning tool and instead transforms into a revenue generation tool.¹⁵⁷ The emphasis is no longer on planning, phased growth or mitigation but the statutes application almost becomes penalty like in nature.¹⁵⁸ The mentality on the part of the public officials is then to treat the funds like what one journalist termed a "slush fund, distributed solely on the basis of preference and not need."¹⁵⁹ The negative effects then trickle down to the homeowners and existing residents who may wind up being taxed again to pay or facilities or projects that should have already been funded pursuant to the APFO.¹⁶⁰ The end result is that rather than promote or manage growth, the operation of the statute curbs growth by driving up property values and taxes and incentivizing developers to take their projects elsewhere where costs will be lower.¹⁶¹ This is

152. *Allied Land Co. v. Board of Supervisors of Loudoun County*, No. 20767, 2001 WL 1398456 (Cir. Ct. of Va. Sept. 25, 2011).

153. *Id.*

154. *Id.*

155. *See id.* at 1.

156. *See id.* at 4.

157. *See* Md. Dep't of Legis. Serv., *Major Issues Review*, Gen. Assemb. D-19, at 301 (June 28, 2010), available at http://www.lincolnnst.edu/subcenters/significant-features-property-tax/upload/sources/maryland/2009/MD_source_doc_FY200710_Major%20Issues%20Review.pdf.

158. *See* Halle Development, Inc. v. Anne Arundel County, 808 A.2d 1280 (2002) (denying recovery of payments to the county that a lower court held were illegal. But in the absence of a statute that authorized the cause of action and recovery the complaint was dismissed for failure to state a cause of action.)

159. *See Lanvale*, 731 S.E.2d at 822.

160. *See* Dustin C. Read & Steven H. Ott, *Adequate Public Facilities Ordinances in North Carolina: A Legal Review* 14 (Jan. 2006) (unpublished working paper) (on file with the Center For Real Estate at University of North Carolina Charlotte), available at <http://www.naiop.org/foundation/apfonclegal.pdf>.

161. *See* Rocky Mackintosh, *Real Estate Development: Can More Housing Mitigate School Infrastructure Problems?*, MACRO REPORT BLOG (May 31, 2011), <http://www.macroltd.com/general/real-estate-development-can-more-housing-mitigate-school-infrastructure-problems>.

contrary to one of the central tenets of the concurrency model, that the goal is not to retard growth but to phase it, to control its timing so that it is well planned and orderly.¹⁶²

Waiver of APFO requirements particularly in the area of schools has been another very contentious issue. Most concurrency statutes have language written in them that allows for a voluntary unilateral waiver by the county. Such waivers, while subject to open debate and criticism by the community, only require approval by the board of commissioners.¹⁶³ Opponents of changes to existing APFO's argue that these decisions are motivated purely by a hope for monetary gains.¹⁶⁴ By minimizing the burden on developers in obtaining approval for construction counties hope that this will entice them to invest more into their projects, as well as discourage them from shopping around for a more favorable location.¹⁶⁵ Proponents on the other hand argue that waivers that grant an exception from the requirements of the APFO to certain developments are not blanket waivers, but are rather applied on a small scale, to a specific project to stimulate growth in a target area, where growth is preferred.¹⁶⁶ The problem is often that these waivers usually take the form of increasing the maximum allowable capacity of local schools.¹⁶⁷ In high growth areas that are already experiencing overcrowding this could mean increasing that limit up to 120% of state rated capacity.¹⁶⁸ This shifts the burden onto the public schools, often already underfunded and struggling to stay on budget.¹⁶⁹ Decreased teacher to student ratios, fewer resources for students, and greater reliability on portable classrooms, which have been found to pose their own health risks,¹⁷⁰ are all adverse consequences associated with an over dependence on waivers as means of control-

162. *Golden v. Planning Bd. Town Of Ramapo*, 285 N.E.2d 291, 298 (Ct. App. N.Y. 1972)

163. See Elizabeth Waibel, *Proposal for APFO waivers in Rockville proves contentious*, GAZETTE.NET (Oct. 1, 2013), <http://www.gazette.net/article/20131001/NEWS/131009781/0/gazette&template=gazette>.

164. *Id.*

165. Holly Shok, *Hagerstown Council takes step toward repealing Adequate Public Facilities Ordinance for schools*, HERALD-MAIL MEDIA (Mar. 22, 2014), http://www.heraldmillmedia.com/news/education/hagerstown-council-takes-step-toward-repealing-adequate-public-facilities-ordinance/article_1c697342-b15b-11e3-b1a9-001a4bcf6878.html

166. *See id.*

167. Edward Lee, *Committee endorses refinements to growth ordinance*, BALT. SUN, Jun. 20, 1999, http://articles.baltimoresun.com/1999-06-20/news/9906220383_1_elementary-schools-middle-schools-adequate-public.

168. *See id.*

169. *See id.*

170. See California Air Resources Board, *California Department of Health, Environmental Health Conditions Inside California's Portable Classrooms*, 1, 2 (November 2004) available at http://www.arb.ca.gov/research/indoor/pcs/leg_rpt/pcs_r21_hi.pdf.

ling growth.¹⁷¹ County officials and developers still defend such policies because allowing overcrowding to a certain degree can in some states be a means to trigger additional state funding of schools.¹⁷² In California for example school districts can petition the state for overcrowding relief funds whose grant is conditional on the phase-out and eventual removal of a certain number of portable classrooms that correlates to the amount of the grant.¹⁷³ While unlocking a potential source of untapped funds, the ultimate end here does not justify the means and is outright contrary to a system that is predicated on notions of planning and forethought with the goal being to avoid the problem outright.¹⁷⁴ If the statutes are not sufficiently responsive to evolving patterns of development the solution should be to replace them with something better suited rather than simply rely on a temporary solution.

C. Examples of Valid Systems with Proper Oversight to Prevent Abuse

Legislatures have not been unreceptive to the problem of letting public officials be the sole interpreter of APFO's, and the body that manages fees collected pursuant to the statutes mitigation requirements.¹⁷⁵ To remedy this proverbial "setting the fox to guard the henhouse" many counties and states have formed independent growth management boards.¹⁷⁶ These boards are often comprised of independent and not politically affiliated professionals, and community activists and represent local interests when it comes to growth and planning.¹⁷⁷ Arguably we need more of these independent boards to oversee, not only the implementation of the APFO's, but their drafting, enactment, enforcement and to make sure that developers and public officials are in compliance when it comes to any agreed rights, responsibilities and deadlines that were made when approval to build

171. See Liam Farrell, *Commission Backs APFO Amendment*, FREDERICK NEWS POST (February 17, 2006) http://m.fredericknewspost.com/archives/commission-backs-apfo-amendment/article_2672a1b4-d162-5372-a016-140094430c14.html?mode=jqm.

172. Editorial, *Adequate public facilities law leave a lot to be desired*, BALT. SUN, JUN. 13, 2013, http://articles.baltimoresun.com/2013-06-11/explore/ph-ag-edit-zone-0612-20130611_1_grading-system-harford-county-council-traffic (Acknowledging how schools are funded for expansion only, leaving empty desks elsewhere).

173. See CALIFORNIA DEPARTMENT OF GENERAL SERVICES, *Overcrowding Relief Grant Program*, <http://www.dgs.ca.gov/opsc/Programs/overcrowdingreliefgrant-program.aspx> (last visited Aug. 7, 2014). The program conditions any grant money on the permanent removal of portable classrooms within six months of the grant. *Id.*

174. *Id.*

175. See Richard Settle, *Washington's Growth Management Revolution Goes to Court*, 23 SEATTLE U. L. REV. 5, 8 (1999).

176. *Id.* at 8.

177. WASH. REV. CODE ANN. § 36.70A.250 (West 2010).

was granted.¹⁷⁸ While the system of laws known as adequate public facilities ordinances has shown that there are weaknesses in the laws that can be exploited and lead to misuse and unintended consequences which ultimately undermine the very purposes the law was enacted for, they are none the less a viable weapon in a regulatory bodies arsenal by which to control growth without inhibiting it.¹⁷⁹ One of the ways that potential misuse can be avoided is to appoint an independent board whose task it is to ensure that decisions concerning growth are made consistent with the goals and needs of the APFO.¹⁸⁰ A separate body such as this preserves the integrity of the APFO as a growth management tool by resolving the issue of inconsistent application and goals among relatively small areas.¹⁸¹ Since enabling legislation vests both counties and incorporated municipalities to enact their own version of such statutes that encapsulate their own growth goals and expectations the results are that the comprehensive plan can often be compromised or growth patterns scattered and erratic.¹⁸² While this is a good means of ensuring future success of the APFO as a growth management tool it is not without its own challenges.¹⁸³ For example, the decisions of such independent boards have proven susceptible to challenge when they are in stark conflict with the views taken by county or municipal officials about the best course of action to take in regards to a growth or development issue.¹⁸⁴ Courts have not been willing to grant sufficient weight to the decisions of independent growth boards when opposition is strong.¹⁸⁵

In *Spokane County v. Eastern Washington Growth Management Hearings Bd*¹⁸⁶, a case illustrative of the point, a separate and impartial board, set up to oversee the implementation of the counties' APFO statute voted against allowing a project to go forward.¹⁸⁷ The decision was based on the desire to achieve several goals that have been problem-

178. Settle, *supra* note 175, at 8.

179. Steven H. Ott & Dustin C. Read, *The Effect of Growth Management Strategies: Adequate Public Facilities Ordinances and Impact Fees A Review of Existing Strategy*, NAIOP (Jan. 2006), <https://www.naiop.org/~media/9887459CA2A243F19B542D68CEA45B4D.ashx>.

180. *Id.*

181. See Paster, *supra* note 24, at 760-61. (Discussing some the inherent problems that exist when planning and growth decisions are made independently on small scale level within the same geographic area.).

182. *Id.*

183. *Id.* at 761.

184. See *Rochow v. Maryland Nat. Capital Park and Planning Com'n*, 827 A.2d 927 (2003) (The Court invalidated the decision of a planning and growth management board to grant approval to a project after finding that the surrounding facilities were adequate. Court held county had exclusive power pursuant to enabling legislation to make such decisions.)

185. *Id.* at 961.

186. *Spokane Cnty. v. Eastern Wash. Growth Mgmt. Hearings Bd.*, 293 P.3d 1248 (Wash. Ct. App. 2013).

187. *Id.*

atic to the enforcement of APFO's not only there but across all jurisdictions nationally.¹⁸⁸ In *Spokane* the developer sought approval of a change to the counties zoning layout that was necessary to approval of its development project.¹⁸⁹ Subsequent studies revealed that road access as a result of the development would violate the counties APFO.¹⁹⁰ Local residents opposed to the project, and the planning board recommend to deny the zoning request and thereby forestall the construction pending satisfactory agreement on how to ensure compliance with the APFO.¹⁹¹ The county commissioners did not heed the recommendation and instead approved the rezoning request thereby allowing the project to move forward.¹⁹² The board asserted that the commissioners had failed to abide by the acts requirement that the County engage in a contemporaneous review of its capital facilities and transportation plans and amend them to address the timing and financing for constructing additional facilities.¹⁹³ The growth board raised several issues related to the inadequacy of roads servicing the proposed project, yet the court, applying a very spongy standard of review sided with the county in spite of the fact that they proffered minimal evidence to support its view on road issue, an admittedly cursory examination by a road planning expert.¹⁹⁴ The court further undermined the boards mission by suggesting that its planning goals were so numerous and varied that there was no way that a proposed project could meet them all and that given the deferential standard that it asserted was due to localities in making their own planning decisions in spite of the oversight of the planning board it was a reality that planning goals would be mutually competitive at times.¹⁹⁵ Whether the result of whether to allow development is a matter of opinion, as the example offered in the introduction shows, opposition to growth is most often tied to emotions of identify and a natural aversion to change.¹⁹⁶ What matters in the *Spokane* case is the elaborate system of oversight that is created through the existence of a separate review board.¹⁹⁷ The result is a multi-tiered system of checks and balances that avoids the financially motivated decision making

188. *Id.* at 1255.

189. *Id.*

190. *Id.*

191. *Id.* at 1253.

192. *Id.*

193. *Id.* at 1253-54.

194. *Id.* at 1253-55. The planning commission conducted an extensive review of the proposal to the APFO that would allow the development project to proceed. *Id.* Their primary ground for voting against the project was the potential for long term traffic problems arising from the fact that the development in their opinion was out of scale and character with the rest of the surrounding community. *Id.* at 1253.

195. See generally *id.* at 1260-63.

196. See Zepp, *supra* note 5.

197. See generally, *Spokane Cnty.*, 293 P.3d at 1248.

that occurs in a vacuum that can exist where the negotiations are defined simply by the developer negotiating for an amount that will allow him to bypass and statutory hurdles with regards to adequate facilities that are holding up his project.¹⁹⁸

Even where planning commissions exist and are vested with authority county officials can often usurp that power to a large degree by amending the APFO and allowing approval to be granted directly by the county council, thereby bypassing any separate review stage where the planning commission would get a say.¹⁹⁹ This happened in Frederick under the guise of making the county more business friendly.²⁰⁰ The county council voted themselves, to admittedly strip the system of its inherent checks and balances by allowing them to make unilateral decisions and approve development without going to the planning board.²⁰¹ The counties actions were motivated by a desire to speed up the approval process and saving time by giving developers approval to start their projects up front.²⁰² This begs the question of why have an APFO at all if you can simply legislate around it.²⁰³ This is not phased growth or planning but a way to fast track through all the provisions that were enacted so that this would not happen.²⁰⁴ And while yes, the end result will be that the county will have money in the hand now the consequences down the road may be disastrous, particularly if the money is then mismanaged or no one is held accountable for taking the proper mitigation measures subsequent to approval.²⁰⁵

V. Conclusion

States should step in now to take a long and hard look at the concurrency system within their borders if they have chosen to create one. The focus should be on bolstering the efficiency and ability of the APFO to act as a growth management tool. This is what these statutes were initially enacted for, but as county officials have seen their tax bases slip they have sought alternative means of supplementing their revenue base. By turning to APFO's and attempting to employ

198. *Id.* The court, in ruling against the decision of the growth management board suggests that by modern planning stages, actual concurrency, having the necessary facilities in place or funding identified prior to the granting of developer approval is both impractical and unrealistic. *Id.* The court puts forth rather circular logic that it's impossible to predict the impact of a project and therefor the mitigation requirements until its approved and its scope is finalized. *Id.* Funding is also not a primary concern according to the court where the developer, under the statute has agreed to finance all the necessary concurrency upgrades. *Id.*

199. *Id.* at 1263.

200. See Anthony, *supra* note 1.

201. *Id.*

202. *Id.*

203. See Neuberger, *supra* note 141.

204. See *supra* note 81, and accompanying text

205. See Jacksonville Business Journal, *supra* note 149.

the statutes for revenue collection they have compromised their integrity as planning tools. The APFO is not a means of levying an entry fee or a penalty to allow developers unfettered access into an area for the sake of seeming business friendly.

In a telling memorandum filed by the head of the city council who spearheaded the approval for the Monrovia Town Center project, the limitations of the present system are highlighted.²⁰⁶ First is the re-statement of the concurrency standard as one requiring reasonable concurrency. No one disagrees that the actual facilities need not be constructed before approval can be granted, but the concurrency model has always demanded a level of planning, timelines, dates, commitments a semblance of clear answers that will preclude problems from arising down the road.²⁰⁷ Yet in this letter the lack of a plan is shrugged off as mere “inadequate specificity.”²⁰⁸ APFO’s cannot sustain as the preferred growth planning tool if public officials and governing bodies do not being to apply them in a different way, a way that puts tangible goals of making improvements ahead of collecting inflated checks from developers. Perhaps the solution is to remove or significantly curtail the monetary option entirely, to get rid of waivers, increase level of service standards, and require not merely in-kind land donations but construction of said facilities “concurrent” with the underlying project.

Vesting more power in the hands of independent growth management boards is advisable as well. Without this vital check and balance on the power of count officials the temptation is great for them to attempt in the absence of a clear legislative mandate either granting or restricting the power to levy impact fees, to do just that. This leads too many APFO’s being struck down in the court systems as ultra vires, whereas they may have passed muster as permissible if mitigation has simply been to delay a project pending completion of a requisite facility. As a baseline there should at the least be more interaction between states, counties and municipalities to ensure that everyone is working towards a common goal, and scheme of development that encapsulates, to as great a degree allowable, everyone’s rights and expectations. While a wide-scale concurrency model may not be possible because of limitations inherent in the system itself, namely that each geographical unit has its own measurable goals and ways to achieve them, greater efforts should be made to track and document the success of specific areas. This could involve tracking the use and effect of a particular jurisdictions APFO. Looking at extent and out-

206. Memoranda, Paul Smith, Monrovia Town Center PUD Zoning Change Case, (January 17, 2014), *available at* http://frederickcountymd.gov/documents/13/1027/Monrovia%20Town%20Center%20011614_201401240917142404.pdf.

207. *See id.* at 3.

208. *See id.* at 4.

come of litigation associated with the law over a specific length of time, the costs incurred by the county, the developers and subsequent homeowners and whether in light of all of that concurrency goals were met, exceeded or simply neglected.